been narrowed and modified by later decisions, which require that the tender be of the whole amount including principal, interest, and costs,[18] unless, indeed, the payment of a lesser sum has been agreed upon; that it must be absolute, in good faith, and that the holder of the mortgage is entitled to a reasonable time to ascertain the amount.[19] Further, the mortgagor may by his actions, waive the rights which he has acquired by a previous tender.[20] Such tender will not cut off subsequently accruing interest,[21] and apparently the purchaser of the equity of redemption must bring his money into court before he can set up his tender.[22] A late tender cannot be made the basis of affirmative relief by the one making the tender, on the ground that he who would get equity must do equity.[23]

In a recent case, *Murray* v. *O'Brien* (Wash. 1909) 105 Pac. 840, the question of the sufficiency of tender was involved. The court in general accepted the New York position, but refused relief on the grounds first, that the time of tender lasted only to the time of bringing suit and not to the time of sale, second, that affirmative relief was sought, and, third, (in a separate opinion) that such relief would allow a pure tender to destroy not only the security for the debt, but the debt itself; as the debt had become unenforceable. In regard to the time in which a tender could be made the court directly overruled an earlier case,[24] and no reason would logically appear why, if the New York theory be adopted, a tender after suit should be less effective than one before. On the question of affirmative relief the decision is undoubtedly correct. As regards the third point it would appear that since a tender, even in a pledge, does not destroy the debt itself,[25] but only the lien or security, if a case is shown where the destruction of the lien would *ipso facto* destroy the debt, or where the security alone is enforceable the debt having been lost, or merged therein, this fact should be considered. It has been so held and actual payment required.[26]. Such a rule would sufficiently limit the New York doctrine and remove most of its possibly objectionable features.

VESTING OF LEGACIES BY PRESENT GIFTS OF INCOME.—In a recent English case, *Mason* v. *Mason* (1910) 101 L. T. 669, the testator devised the income of certain funds to his daughter, till marriage, and the court held that by force of such a gift, she was entitled to the funds from which the income was derived as well as the income itself. The implication of a gift of the *corpus* undoubtedly arises under such circumstances from the fact, that, since the person entitled to the income is generally the one who holds the principal, such, in the particular case, was the intent of the testator in making the be-

[17]Graham *v.* Linder (1872) 50 N. Y. 547.

[18]Thornton *v.* Nat. Exch. Bank (1879) 71 Mo. 221.

[19]Potts *v.* Plaisted (1874) 30 Mich. 149.

[20]Fry *v.* Russell (1876) 35 Mich. 229.

[21]Nelson *v.* Loder (1892) 132 N. Y. 288.

[22]Harris *v.* Jex (N. Y. 1873) 66 Barb. 32.

[23]Tuthill *v.* Morris (1880) 81 N. Y. 94; Weiner *v.* Tuck (1891) 127 N. Y. 217.

[24]Thomas *v.* Seattle B. & M. Co. (1908) 48 Wash. 560.

[25]Tuthill *v.* Morris *supra.*

[26]Harris *v.* Jex *supra.*

quest. It seems, moreover, that it is only a gift of the whole income which has this effect[1] and it is submitted that in regard to the vesting of legacies, which otherwise would be contingent, a gift of income plays a similar rôle.

In general, the vesting of a legacy is controlled by the finding of fact as to whether the testator has made an antecedent gift with a direction to pay,[2] or whether the only gift is in the direction to pay, and in deciding this question, the intent of the testator is, of course, the determining factor.[3] If by the use of clear words of condition, he provides that the gift shall not take effect until the happening of a certain event, it is apparent that this event was intended as a condition precedent to the vesting of the legacy.[4] It is only when in addition to such words of condition, the testator adds other circumstances that the court can find an intent sufficient to rebut the *prima facie* effect of expressions which ordinarily import conditions. When such circumstances take the form of a present gift of interest, the rules of construction have virtually crystallized into a rule of law that the legacy is vested. Not every gift of interest, however, has this effect. When the testator unqualifiedly declares that the legatee shall be entitled to interest on the principal sum as it from time to time accumulates, it seems a fair presumption that he intended the interest to follow the gift[5] because he who receives the income of property is ordinarily its owner, but if the interest itself is made contingent such a presumption will not arise.[6] It appears, moreover, that it is only a gift of the entire interest which will have this effect, for a gift of only part would create a presumption of two distinct gifts rather than a gift of the principal sum with interest.[7] It follows, then, that if the time during which the interest is to be paid is not co-extensive with the period during which the payment of the legacy is contingent,[8] or if it is to be computed on another fund,[9] the legacy will not vest, for in neither of these cases can it be said that the legatee is entitled to the whole income of the principal sum. It seems, moreover, that, for the same reason, a gift of interest to be computed on a part of the legacy or at a fixed rate less than that which the principal sum yields, must be equally ineffectual to determine the question of vesting. It does not follow, however, that because the trustees of the *corpus* are given discretion to apply less than the whole income for the maintenance of the legatee that the gift will not vest.[10] In such a bequest, it is evident that the gift includes the whole interest but that in the application of it to the use of the legatee the trustees are clothed with discretion simply to provide against its improvident use before the time set for payment

[1] *In re* L'Heminier L. R. [1894] 1 Ch. 675.

[2] Merry *v.* Hill (1869) L. R. 8 Eq. 619.

[3] Stapleton *v.* Cheales (1711) Prec. Chanc. 317.

[4] Furness *v.* Fox (Mass. 1848) 1 Cush. 134.

[5] Hoath *v.* Hoath (1785) 2 B. C. C. 3; *In re* Hart's Trusts (1858) 3 De. G. & J. 195.

[6] Knight *v.* Knight (1826) 2 Sim. & St. 490.

[7] Hansom *v.* Graham (1801) 6 Ves. 238.

[8] Thomas *v.* Wilberforce (1862) 31 Beav. 299.

[9] Watson *v.* Hayes (1839) 5 Myl. & Cr. 125; Batsford *v.* Kebbell (1797) 3 Ves. 363.

[10] Fox *v.* Fox (1875) L. R. 19 Eq. 286.

of the principal sum. Even where the gift includes the whole interest, it is possible to make the interest and the principal the subject of distinct legacies, and such would seem to be the presumption where the interest is to be accumulated and paid simultaneously with the principal sum.[11]. In such cases, obviously, the provision as to interest can have no effect on the vesting of the legacy.

Where the devise is to a class of persons, it becomes important to distinguish between a gift to a contingent class and a gift to a class on contingency. Thus, in a gift to "those children who attain twenty-one", it seems obvious that the testator intended to include only those who answer that description and a gift of interest will not, therefore, affect the vesting of the legacy.[12] Where, on the other hand, the gift is to children "when they attain twenty-one",[13] a gift of interest seems as indicative of the testator's intent to make a present bequest as if it were a gift to a single individual. In such cases, however, if the interest on the aggregate sum is to be applied indiscriminately for the maintenance of the whole class such a provision can have no effect on the vesting of any particular share for it cannot be said that interest has been given on that share.[14] But where the income of each presumptive share is to be paid to its prospective holder, the case is precisely as if it were a gift to a single individual and such a provision will have the effect of immediately vesting the legacy.[15]

Some courts have observed the distinction between a direct gift of interest and a gift of maintenance.[16] This distinction is based on the fact that where maintenance only is given the legatee can call for no more than is necessary for that purpose, which may not amount to the whole interest.[17] In so far as this is the fact, the distinction seems sound, but where maintenance is given the question arises whether it is a distinct gift or merely a direction as to the application of the interest. If the former, it can, of course, have no effect on the vesting of the legacy; if the latter, it should have the same effect as a direct gift provided the whole interest is included,[18] for it is the fact that the whole income has been bequeathed,[19] rather than the use to which it is to be applied, which indicates the testator's intent to make a present gift of the principal sum.

DISCRIMINATION IN CONNECTION WITH PRIVATE FREIGHT CARS.—The use of private or individual freight cars has given rise to various questions in recent decisions. In the case of private oil tank cars, the question has arisen concerning the proper allowance in rates to be made a shipper who supplies his own cars. That a reasonable rental

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[11]Lock *v.* Lamb (1867) L. R. 4 Eq. 372.

[12]*In re* Ashmore's Trusts (1869) L. R. 9 Eq. 99; Bull *v.* Pritchard (1826) 1 Russ. 213.

[13]Hansom *v.* Graham *supra.*

[14]*In re* Parker (1880) L. R. 16 Ch. Div. 44; *In re* Gosling [1902] 1 Ch. 945.

[15]*In re* Turney L. R. [1899] 2 Ch. 739.

[16]Pulsford *v.* Hunter (1792) 3 B. C. C. 416.

[17]Hansom *v.* Graham *supra.*

[18]Watson *v.* Hayes *supra.*

[19]Warner *v.* Durant (1870) 76 N. Y. 133.